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SUPREME COURT U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 253.

THE UNITED STATES, *Petitioner*,

v.

PENN FOUNDRY AND MANUFACTURING COMPANY, INC.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF FOR THE RESPONDENT.

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INDEX.

SUBJECT.

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statement	2
Summary of Argument	4
Argument	7
I. The Court of Claims' finding that respondent would have made a net profit of at least $80,000 is conclusive on this record	7
A. Anticipated profits are a proper element of damages for breach of contract, and this is so whether the Government or a private party commits the breach	7
1. The Government's liability on contracts is, except as modified by statute, the same as that of private parties	7
2. Loss of anticipated profits is a proper element of damages upon breach of contract	8
B. The Court of Claims' finding as to loss of profits was not speculative, and in any event is not reviewable	10
1. The finding is conclusive in the present state of the record	10
2. Loss of profits was not speculative nor was the finding on loss of profits inconsistent with other findings	13
C. The Court of Claims did not err in failing specifically to find that respondent could not have successfully performed the contract and at a profit	21

Page

II. Petitioner had neither contractual nor statutory right to cancel the contract with respondent, and since this question is outside of the record, it is not before this Court 23

A. On the present record, petitioner's contention as to the right to cancel is untimely 23

B. When this contract was awarded and cancelled, cancellation was not justified by any established administrative policy even if such policy is considered material here 25

C. When this contract was awarded and cancelled, there was no statutory authority for unilateral termination 27

Summary 36

Conclusion 37

CASES.

Alexander v. Machan, 147 U.S. 72 ..... 12, 14
Anvil Mining Co. v. Humble, 153 U.S. 540 8
Canal Bank v. Hudson, 111 U.S. 66 ..... 13, 23
Cincinnati Siemens-Lungren Gas Co. v. Western Siemens-Lungren Co., 152 U.S. 200 8
Wm. Cramp & Sons Ship and Engine Bldg. Co. v. United States, 239 U.S. 221 12
Crocker v. United States, 240 U.S. 74 12
District of Columbia v. Pace, 320 U.S. 698 16
Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 ..... 8, 19–20
Gulf State Creosoting Co. v. Loving, 120 F. 2d 195 20
Haddad v. Western Contracting Co., 76 F. Supp. 987 .. 19
Hinckley v. Pittsburgh Bessemer Steel Co., 121 U.S. 264 8
Hoffer Oil Corp. v. Carpenter, 34 F. 2d 589 20
Howard v. Stillwell & Bierce Mfg. Co., 139 U.S. 199 .. 9, 19
Fred T. Ley v. United States, 273 U.S. 386 12
Luckenbach S. S. Co. v. United States, 272 U.S. 533 .. 12
Lynch v. United States, 292 U.S. 571 8
Mahan v. United States, 14 Wall. 109 12
Muschany v. United States, 324 U.S. 49 16
Needles v. United States, 101 Ct. Cls. 535 20

Page

Oregon-Washington R. & N. Co. v. United States, 255 U.S. 339 22
Perry v. United States, 294 U.S. 330 8
Phila. W. & B. R. R. Co. v. Howard, 13 How. 307 8
Priebe & Sons v. United States, 332 U.S. —, 92 L. ed. 95 8
Reed's Sons v. United States, 273 U.S. 200 13
Saalfield v. United States, 246 U.S. 610 12
Saginaw Broadcasting Co. v. Federal Comm. Comm., 96 F. 2d 544 24
Smoot's Case, 15 Wall. 36 8
State National Bank of Boston v. United States, 96 U.S. 30 8
Stilz v. United States, 269 U.S. 144 12
Stone v. United States, 164 U.S. 380 12
United States v. Behan, 110 U.S. 338 ..... 9, 19
United States v. Bethlehem Steel Corp., 315 U.S. 289 ..... 9, 10, 19, 37
United States v. Causby, 328 U.S. 256 12
United States v. Clarke, 20 Wall. 92 22
United States v. Esnault-Pelterie, 299 U.S. 201, 303 U.S. 26 12
United States v. Purcell Envelope Co., 249 U.S. 313 ..8, 15
United States v. Seminole Nation, 299 U.S. 417 24
United States v. Shoshone Tribe, 304 U.S. 111 12
United States v. Smith, 94 U.S. 214 ..... 8, 14, 20
United States v. Standard Rice Co., 323 U.S. 106 8
United States v. Wells, 283 U.S. 102 ..... 12, 18, 23
United States v. Wyckoff Pipe & Creosoting Co., Inc., 271 U.S. 263 ..... 14, 20
Walling v. General Industries Co., 330 U.S. 545 16
Western Union Telegraph Co. v. Hall, 124 U.S. 444 ..8, 19

STATUTES AND COURT RULES.

Act of June 15, 1917, 40 Stat. 182 31
Act of March 2, 1919, 40 Stat. 1272 31
Act of Feb. 13, 1925, 43 Stat. 939, 28 U.S.C. 288 11
Act of May 22, 1939, 53 Stat. 752, 28 U.S.C. 288 ..... 11, 12
Contract Settlement Act of 1944 (July 1, 1944, c. 358, 58 Stat. 649, 41 U.S.C., Supp. V, 101 *et seq.*) 34
First War Powers Act (Act of December 18, 1941, c. 593, Title II, Sec. 201, 55 Stat. 839, 50 U.S.C., App. Supp. V, 611 ..... 27, 28, 30, 35

Page

Rule 41, Revised Rules of the Supreme Court 24
Rule 75(b), Rules of the Court of Claims 12, 14
Rule 99(b), Rules of the Court of Claims 11

MISCELLANEOUS.

Army Procurement Regulation 15 35
Director of War Mobilization, Directive No. 1 (9 Fed. Reg. 478; C.C.H. Gov't Contracts Rep., paragraph 41, 203 *et seq.*) 27
Executive Order No. 9001 (December 27, 1941, 6 Fed. Reg. 6787, 3 C.F.R., 1941 Supp., pp. 330-332) 28, 29
Goldman, *Termination of War Contracts*, 42 Mich. L. Rev. 733 30
Grasse, *The Law of Government Defense Contracts* (1941) 8
Hearings before Subcommittee of Senate Committee on Military Affairs on *Problems of Contract Termination* (considering S. 1268, S. 1280 and S. J. Res. 80, 78th Cong., 1st and 2nd Sess., 1943-1944) 27, 29, 31-33
J.A.G., Bull. Vol. 1, No. 5, pp. 304-305 (October 1942) 30
Joint Termination Regulation 26-27
La Brum, *Termination of War Contracts for the Government's Convenience*, 18 Temple L. Q. 1 ..... 8, 26, 35
Mahman, *Policies and Procedures for the Termination of War Contracts*, 10 Law and Contemp. Prob. 449 35
Navy Contract Termination Directive No. 1 of February 28, 1941 26
Navy Procurement Directives
September 16, 1942 30
July 7, 1943 30
December 15, 1944 30
Office of Contract Settlement, *History of War Contract Terminations and Settlements* 31
Office of War Mobilization, *Report on War and Post-War Adjustment* (1944), 90 Cong. Rec. No. 2, January 11, 1944 27
Ops. Atty. Gen., Vol. 40, No. 53, August 29, 1942 29
War Department, *Government Contracts and Readjustment* 33-34
Williston on *Contracts* (Rev. ed., 1945) 8, 36

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OPINION BELOW.

The opinion of the Court of Claims (R. 22-26) is reported at 110 Ct. Cls. 374. Its special findings of fact and conclusion of law are set out in the record at pp. 16-22 and 22 respectively.

JURISDICTION.

The judgment of the Court of Claims was entered February 2, 1948 (R. 26). Petitioner's motion for a new trial was denied June 1, 1948 (R. 27). The petition for a writ of certiorari was filed August 31, 1948, and granted November 8, 1948 (R. 28). The jurisdiction of this Court is invoked under the provisions of Section 3(b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939 (Old Judicial Code, 28 U. S. C. 288; New Judicial Code, 28 U. S. C. 1255 (1)).

QUESTIONS PRESENTED.

1. Whether, upon the Government's breach of a binding contract, the Court of Claims' special finding of fact that respondent would have made a net profit of not less than $80,000 and that it was damaged in that amount is conclusive, particularly where the evidence is not before this Court.

2. Whether a contractor's profits anticipated directly from the performance of a contract may be awarded in damages upon breach of that contract by the Government.

3. Whether, in the absence of an express contractual right to terminate, either administrative practice and policy or the First War Powers Act authorized the Government unilaterally to cancel its contract with respondent, and whether, in any event, this question is open on the present record.

STATEMENT.

On June 21, 1944, respondent filed a petition in the Court of Claims to recover its damages arising out of petitioner's unauthorized breach of contract for delivery of certain naval gun mounts (R. 1-14). After full hearings on the evidence and argument, the Court of Claims entered judgment for the respondent in the sum of $80,000 (R. 26) predicated upon its exhaustive special findings of fact (R. 16-22), conclusion of law (R. 22) and supporting opinion (R. 22-26). Thereafter, petitioner's motion for a new trial was denied by order of June 1, 1948 (R. 27).

The facts upon which respondent's claim was predicated and the judgment below was founded are fully detailed in the Court of Claims' Special Findings of Fact (R. 16-22). Briefly, those findings show that respondent is a Virginia manufacturing corporation (R. 16), with an extensive plant and facilities at Waynesboro, Virginia (R. 17). In an endeavor to secure Navy work, respondent, late

in 1940 or early in 1941, made various arrangements and expenditures to prepare itself for such activity. In addition to making numerous repairs to its plant (R. 21), it obtained the services of necessary executive, managerial and engineering employees (R. 17, 21). Early in 1941, respondent entered into negotiations with the Navy Department for the production of gun mounts (R. 17). In April 1941, respondent submitted its proposal and prior to July 1941 gave the Navy a list of equipment owned by it or deemed available for the work (R. 17). A naval representative inspected respondent's plant in July 1941 and talked to the engineer later employed as respondent's general manager (R. 17). After several conferences, in the course of which respondent was requested to and did submit additional data as to its facilities and proposed operations (R. 10), the Navy Department accepted as satisfactory respondent's proposal as to prices, quantities, delivery schedule, payments and options for additional mounts (R. 17).

Respondent's proposal showed that it contemplated subcontracting for production of necessary castings and certain other component parts of the gun mounts, and it had contacted certain producers who were willing to furnish these castings and parts (R. 10, 19). Moreover, respondent had carefully surveyed and planned for its labor supply which was locally available (R. 19).

After the foregoing exchange of data, the Navy, on December 29, 1941, after approval by the Under-Secretary of the Navy, issued a "letter of intent" to the respondent, confirming its previous advice that an order for gun mounts would be placed with it (R. 17-18; Resp. Ex. No. 3, R. 12-13). This letter of intent was accepted by respondent on January 10, 1942 (R. 18).

During January 1942 respondent corresponded and conferred with Navy representatives concerning a suggested performance bond, and respondent thereupon submitted a surety's proposal in that connection (R. 18-19). Testi-

mony below differed as to whether the surety's proposal was accepted by Navy officials as satisfactory when submitted or whether the officials stated that it would be considered to determine whether it was satisfactory (R. 19). In any event, without further questions or objections to the surety's proposal, on February 23, 1942, the Navy mailed an "Official Award of Navy Contract Nos. LL9655[illegible] for gun mounts in the amount of $2,087,555 (R. 13-14)—which was received by the respondent the next day—authorizing respondent "to commence performance of [its] proposal" (R. 20; Resp. Ex. No. 4, R. 13-14). Shortly thereafter, petitioner cancelled the contract (R. 20).[1]

In addition to the foregoing facts, the Court of Claims found that "if the [respondent] had been permitted to perform its contract, it would have made a net profit of not less than $80,000" (R. 21). And the Court entered judgment accordingly (R. 26).

SUMMARY OF ARGUMENT.

I.

A. When the Government enters into a contract with a private party, even with respect to wartime procurement, its rights and liabilities are governed by the law applicable between private parties. Under the established law of contracts and damages, anticipated profits which, as in the instant case, would have resulted directly from performance (by reason of the spread between cost and the con-

[1] Petitioner concedes, for purposes of this case, that the issuance of the notice of award created a binding contract between the United States and the respondent, and that, except insofar as its argument with respect to the alleged right to cancel is concerned, its cancellation constituted a breach of contract (Br. 18-19).

Petitioner's dubious explanation of the alleged error in mailing the notice of award, which it sets out as part of the facts of this case (Br. 8-9), forms no part of the findings of fact below and by petitioner's own argument (see Br. 27-28) cannot be considered here.

tract price) are a proper element of damages upon breach, whether by the Government or private parties.

B. The finding that respondent would have made a net profit of not less than $80,000 had petitioner permitted it to perform the contract is conclusive on the present record because that finding was made by the Court of Claims, acting as a jury, and no testimony has been brought up in the record to show that this finding is not supported by substantial evidence. Accordingly, it must be presumed that there was substantial evidence to support the finding as made.

In any event, various evidentiary findings made show that the ultimate finding as to profits was not speculative. The evidentiary findings which petitioner claims show that respondent was unable to produce in compliance with the contract, when read in the context of all the findings do not show respondent's inability to perform but rather that it would have encountered problems in performance which might have had an adverse effect upon its claimed loss of profits, and this formed the basis of the court's evalution of such findings by appropriate reduction of the quantum of profits allowed.

By well established legal standards the anticipated profits allowed respondent in damages were not speculative or remote because they were the direct expected fruits of production under the instant contract. And since petitioner prevented their more definite ascertainment by preventing production, it cannot object to the fact that the trier of facts made an estimate upon the proof submitted or that the loss of profits resulting from breach cannot be established with mathematical exactitude.

C. The Court of Claims was only required to find respondent's damages resulting from the breach, and not incidental evidentiary facts such as whether it could have performed the contract. Moreover, the finding as to the profits that would have been made implicitly covered the

evidentiary fact that respondent could have performed and made unnecessary any negative finding that respondent could not have performed. The finding as to loss of profits properly took into consideration possible difficulties of performance as a factor in the determination of the amount of such anticipated profits.

II.

A. Petitioner's contention that by reason of administrative policy and the application of the First War Powers Act it had the right unilaterally to cancel this contract cannot be considered here because no evidence was offered to this effect nor was the point raised in the Court of Claims, and its judgment cannot, therefore, be said to be erroneous in this regard. This contention, even if meritorious, would be a matter for timely proof in the trial court.

B. Even assuming this contention is properly presented on the present record, there is no evidence whatsoever that, as of the time this contract was negotiated and terminated, the *Navy* followed such a definitive and controlling practice as to termination clauses in its contracting that the Court would be justified in reading such a clause into this contract.

C. Moreover, no such right of unilateral termination by the Government was conferred by the First War Powers Act. Plainly the language of that statute permitted only such changes in contracts as were brought about by mutual agreement of the parties. In any event, the delegation of authority under the statute effected by Executive Order 9001 was so circumscribed. And both the statute and the executive order were so understood by Congress, the Attorney General of the United States, the War and Navy Departments, the Office of Contract Settlement and writers conversant with termination problems.

ARGUMENT.

I.

THE COURT OF CLAIMS' FINDING THAT RESPONDENT WOULD HAVE MADE A NET PROFIT OF AT LEAST $80,000 IS CONCLUSIVE ON THIS RECORD.

Petitioner, though not so disposed below, concedes that the issuance of the notice of award created a binding contract between it and the respondent (see FN. 1, *supra*) but contends expressly or inferentially:

A. That unearned anticipated profits could not be awarded against the Government;

B. That respondent's loss of profits is speculative and lacks required certainty; and

C. That the Court of Claims erred in not finding that respondent had failed to prove that it could have successfully performed the contract and at a profit.

These contentions will be discussed seriatim.

A. Anticipated profits are a proper element of damages for breach of contract, and this is so whether the Government or a private party commits the breach.

1. THE GOVERNMENT'S LIABILITY ON CONTRACTS IS, EXCEPT AS MODIFIED BY STATUTE, THE SAME AS THAT OF PRIVATE PARTIES.

Because of the inferences to the contrary cast by petitioner's argument, it is appropriate early to dispel the notion that apart from statutory definition the Government does not have the same contractual responsibility as private parties and that its liability upon breach is measured by special or extenuating standards. This Court has long and repeatedly recognized that when the United States enters into contractual relations with a private person, it

is divested of its sovereign character to the extent at least that its rights and duties and its liability for breach are governed by the law applicable to contracts wholly between private parties. See e.g., *Priebe & Sons* v. *United States*, 332 U. S. , 92 L. ed. 95, 98; *United States* v. *Standard Rice Co.*, 323 U. S. 106, 111; *Perry* v. *United States*, 294 U. S. 330; *Lynch* v. *United States*, 292 U. S. 571; *State Nat'l. Bank of Boston* v. *United States*, 96 U. S. 30; *United States* v. *Smith*, 94 U. S. 214; *Smoot's Case*, 15 Wall. 36, 47. See also remarks of Attorney General, quoted *infra* p. 32; Williston on *Contracts* (Rev. ed., 1945), Vol. 9, *War Contract Claims*, Sec. 195; LaBrum, *Termination of War Contracts For the Government's Convenience* (Dec. 1943), 18 Temple L. Q. 1, 9; Graske, *The Law of Government Defense Contracts* (1941) Sec. 134.

As will be shown later in greater detail (See Part II, *infra*, at pp. 32-34), the foregoing principle has been assumed—even by the officers of the Government—to apply with equal force to wartime procurement contracts except insofar as modified by express contractual reservations or by statute.

2. Loss of Anticipated Profits Is a Proper Element of Damages Upon Breach of Contract.

Beyond question, the law of damages allows recovery of anticipated profits upon breach of contract whether by the Government or private parties: *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U. S. 359, 379; *United States* v. *Purcell Envelope Co.*, 249 U. S. 313; *Anvil Mining Co.* v. *Humble*, 153 U. S. 540; *Cincinnati Siemens-Lungren Gas Co.* v. *Western Siemens-Lungren Co.*, 152 U. S. 200, 206; *Western Union Telegraph Co.* v. *Hall*, 124 U. S. 444, 454-455; *Hinckley* v. *Pittsburgh Bessemer Steel Co.*, 121 U. S. 264, 275; *Phila. W. & B. R. R. Co.* v. *Howard*, 13 How. 307, 344. See also memorandum of the Attorney General quoted *infra* at pp. 32-33. The apparently conflicting propo-

sition quoted by petitioner (Br. 25) is belied both by the the cases cited hereinabove and by examination of the full text of the opinions quoted in petitioner's brief. The reference from *Howard* v. *Stillman & Bierce Mfg. Co.*, 139 U. S. 199, in context is found to concern only disallowance of profits anticipated from engagements patently collateral to or not considered in the contract breached. See discussion *infra*, pp. 18-19. It was meant to apply only to a situation where, for example, A contracts with B for the repair of A's machine and then, upon B's delay, A claims as damages his loss of profits from sales of goods which could have been manufactured had the machine been repaired on time. In such a case, B's breach of the repair contract entitles A to recover damages for breach of the repair contract, but not damages measured by the anticipated profits on his contracts for sale of goods.

Furthermore, petitioner cavalierly dismisses (in a footnote) as clearly inapplicable here the very situation recited in the *Howard* case, *supra*, and in *United States* v. *Behan*, 110 U. S. 338, and raised by the facts of the instant case, where anticipated profits are recoverable. Here "it may reasonably be presumed that [profits on the gun mount contract itself] were within the intent and mutual understanding of both parties at the time" the contract was made, because such contracts are not made without anticipation of profit directly from performance represented by the difference between cost and the contract price. See *United States* v. *Bethlehem Steel Corp.*, 315 U. S. 289, quoted, *infra*, p. 10.

To avoid the operation of this established rule of damages permitting recovery of direct anticipated profits upon breach of contract by the Government, petitioner argues first, that the profits awarded respondent were speculative, and second—although this argument is not clearly spelled out—that anticipated profits should not have been awarded respondent due to the wartime exigencies under which this contract was let and cancelled. The first argument, even

assuming it can be advanced here, is fully answered in point B immediately following; the second argument is disposed of by Part II of the Argument herein (*infra*, pp. 23-25) and by the answer given to a similar contention in *United States* v. *Bethlehem Steel Corp.*, 315 U. S. 289, 304-305. There the Government resisted payment under certain World War I ship construction contracts on the grounds that the profits provided were too high and unconscionable and that the contracts were entered into by the Government under the duress of war which made it an easy prey for contractors. To such arguments this Court said:

> "... Congress must have anticipated that in the contracts agreed upon profits would be expected and that self interest inherent in commercial transactions would make itself felt. Therefore, in seeking to establish duress from the circumstances in which these contracts were made, the government is relying on the identical circumstances which were in existence at the time Congress chose the policy of authorizing procurement of ships through commercial negotiation. We cannot now invalidate contracts made pursuant to a congressionally selected policy on the sole ground of the coercive effect of circumstances which Congress clearly contemplated. To do so we would have to repudiate legislative power exercised in proper constitutional sphere".

B. The Court of Claims' finding as to loss of profits was not speculative, and in any event is not reviewable.

1. The Finding is Conclusive in the Present State of the Record.

On the present record it is clear that petitioner cannot attack the finding below that respondent would have made a net profit of not less than $80,000 had it been permitted to perform the contract. Prior to the amendment of the provisions of the Judicial Code relating to review of Court

of Claims cases on certiorari,[2] it was the well established rule of this Court that findings of fact made by the Court

[2] The Act of Feb. 13, 1925, c. 229, § 8, 43 Stat. 939; 28 U. S. C. 228 provided that:

> "(b) In any case in the Court of Claims, including those begun under section 287, it shall be competent for the Supreme Court, upon the petition of either party, whether Government or claimant, to require, by certiorari, that the cause, including the findings of fact and the judgment or decree, but omitting the evidence, be certified to it for review and determination with the same power and authority, and with like effect, as if the cause had been brought there by appeal."

That Act was amended in 1939 (Act of May 22, 1939, c. 140, 53 Stat. 752) to provide:

> "(b) In any case in the Court of Claims, including those begun under section 287 of this title, it shall be competent for the Supreme Court, upon the petition of either party, whether Government or claimant, to require, by certiorari, that the cause be certified to it for review and determination of all errors assigned, with the same power and authority, and with like effect, as if the cause had been brought there by appeal. In such event, the Court of Claims shall include in the papers certified by it the findings of fact, the conclusions of law, and the judgment or decree, as well as such other parts of the record as are material to the errors assigned, to be settled by the Court.
>
> "The Court of Claims shall promulgate rules to govern the preparation of such record in accordance with the provisions of this section [see Rule 99(b), Rules of the Court of Claims].
>
> "In such cases the Supreme Court shall have authority to review, in addition to other questions of law, errors assigned to the effect that there is a lack of substantial evidence to sustain a finding of fact; that an ultimate finding or findings are not sustained by the findings of evidentiary or primary facts; or that there is a failure to make any findings of fact on a material issue."

Under the New Judicial Code, effective September 1, 1948, the above provisions were recodified into 28 U. S. C. 1255, which although it eliminates much of the language of the 1939 amendment, has the same effect. See official Revisor's note to 28 U. S. C. 1255.

of Claims were conclusive and not subject to appellate review. *United States* v. *Causby*, 328 U. S. 256; *United States* v. *Wells*, 283 U. S. 102, 120; *Fred T. Ley* v. *United States*, 273 U. S. 386; *Luckenbach S. S. Co.* v. *United States*, 272 U. S. 533; *Stilz* v. *United States*, 269 U. S. 144; *Saalfield* v. *United States*, 246 U. S. 610; *Wm. Cramp & Sons Ship and Engine Bldg. Co.* v. *United States*, 239 U. S. 221; *Mahan* v. *United States*, 14 Wall. 169. It is the duty of the Court of Claims to deal with conflicting evidence or inferences to which evidence might give rise. *United States* v. *Esmault Pelterie*, 303 U. S. 26. Such findings determine all matters of fact precisely as does the verdict of a jury. *United States* v. *Causby*, 328 U. S. at 268; *United States* v. *Wells*, 283 U. S. at 120; *United States* v. *Esmault-Pelterie*, 299 U. S. 201, 205; *Stone* v. *United States*, 164 U. S. 380. See also Rule 75(b), Rules of the Court of Claims. And this Court is not—so it has said—at liberty to refer to the opinion of the Court of Claims in order to eke out, control or modify the scope of the findings. *United States* v. *Shoshone Tribe*, 304 U. S. 111, 115; *United States* v. *Wells*, *supra*; *Crocker* v. *United States*, 240 U. S. 74.

Nor are the foregoing principles of the finality of Court of Claims' findings of fact less applicable to the instant case by reason of the 1939 amendment of the statute relating to review of Court of Claims judgments. That amendment (see fn. 2, *supra*) permits this Court to review "errors assigned to the effect that there is a lack of substantial evidence to sustain a finding of fact". But both by the language of the amending act and by established principles of appellate practice such assignments of error cannot be considered in the absence of pertinent portions of the transcript of evidence below. Thus in *Alexandre* v. *Machen*, 147 U. S. 72, 77, this Court held that where review is sought alleging error in the failure to make a finding or in making findings unsupported by evidence, so much of the testimony as was necessary to establish this ground of complaint must be incorporated in the record. And where

the evidence is not contained in the record, it must be presumed to be sufficient to support the findings made. *Canal Bank* v. *Hudson*, 111 U. S. 66, 81.

Accordingly, on the present record it must be assumed that there was substantial evidence to support the finding below as to the net profit respondent "would have made" had petitioner not cancelled the contract, and that finding cannot be reviewed or challenged in the absence from the record of pertinent evidence, nor can it be modified or controlled by reference to the opinion or otherwise. See *Reed's Sons* v. *United States*, 273 U. S. 200, 202.[3]

2. Loss of Profits Was Not Speculative Nor Was the Finding on Loss of Profits Inconsistent With Other Findings.

The tenor and technique of petitioner's challenge of the allowance of anticipated profits illustrates the wisdom of the rule that lower court findings cannot be attacked on appeal in the absence of the evidentiary record. Petitioner argues that the ultimate finding as to loss of anticipated profits was speculative, that it conflicts with evidentiary findings, and that respondent failed to meet its burden of proof on damages (Br. Point A. 2, pp. 20-27). However, the ultimate finding as to loss of profits was patently based upon an evaluation of testimony and other evidence which does not appear in the present record.

For example, the record does not show, and petitioner omits to state, that respondent adduced considerable evidence at the trial below—such as complete cost accounting data and engineering manufacturing estimates—showing

[3] This Court there stated:

> "The argument here consisted mainly of an effort to show, by reference in the brief to portions of the evidence introduced before the Court of Claims, that the contract sued on was made as alleged and that authority to make it had been conferred upon the depot quartermaster. The evidence is not before us; and we must accept the findings of the Court of Claims."

that it would have made a net profit of from 8% to 19% of the contract price (or more than twice as much as the Court of Claims' finding and award). The omission from the findings of such evidentiary matter in support of the ultimate finding as to loss of profits and damages is not of any moment for "the court of claims is under no obligation when assessing damages to specify the elements of the calculation by which it arrives at the result; that itemization is often impossible . . . like a jury, the court may make an estimate and return such sum as the damages recoverable". *United States v. Wyckoff Pipe & Creosoting Co., Inc.*, 271 U. S. 263, 267-8. To the same effect see *United States v. Smith*, 94 U. S. 214, 219. ". . . it is only upon the ultimate facts which the court is bound to find . . . this Court will not take notice of a refusal to find the mere incidental facts, which only amount to evidence from which the ultimate fact is to be obtained." *Alexandre v. Machan*, 147 U. S. 72, 77-78. See also Rule 75(b), Rules of the Court of Claims.

As a matter of fact, the Court of Claims did mention numerous evidentiary factors showing that its ultimate finding as to loss of profits and damages was predicated on a fair and proper evaluation of the evidence and not, as petitioner would have it, upon mere speculation. The court considered evidence showing that respondent had fully and carefully planned for production under the contract (R. 17, 19, 22-23, 25), that it had made various necessary sub-contracting arrangements (R. 19), that it had surveyed and planned its labor requirements and supply (R. 19), that its plant facilities were accepted as satisfactory by the Navy (R. 17), that it had secured expert engineering services for management to be compensated for by a percentage of profit (R. 17; 25), that the respondent was willing to finance performance without advance funds from the Navy (R. 25) and that after various conferences between officials of respondent and the Navy and upon the submission by respondent of detailed supporting

data as to its plans, equipment and proposals, they were accepted as satisfactory and the contract awarded (R. 17, 23-24). Even if the Court of Claims had not marshalled these various evidentiary factors, as it did, it must be assumed that similar evidentiary factors were considered and evaluated in arriving at the ultimate finding of fact that respondent would have made a profit. *United States* v. *Purcell Envelope Co.*, 249 U. S. 313, 321.

Ignoring the probative weight of these supporting evidentiary items and without bringing up the evidence to enable this Court to review whether the ultimate finding below is supported by substantial evidence, petitioner argues that the ultimate finding as to loss of profits is inconsistent with other evidentiary findings relating to respondent's preparedness and capacity to have produced the gun mounts in accordance with the contract and at a profit. That argument is patently unsound.

At the outset it should be noted that the allegedly inconsistent evidentiary findings relied upon by petitioner are overstated in its brief. For example, quoting a finding below showing that respondent was not prepared or ready to commence work under the contract, petitioner prefaces the quotation with the statement that this condition existed at the time that the instant contract was awarded (Br. 24). In contrast, reference to the findings below merely shows that these conditions existed on occasions *prior* to the time that the contract was awarded to the respondent. And not a single one of the conditions relied upon by petitioner as showing that respondent could not have performed were unknown to it prior to the time that the contract was negotiated and let. Moreover, statements as to respondent's condition of readiness *prior* to the award are of little significance in view of the facts that the contract may not have been finally awarded respondent; that until the final award was made there was a possibility that it would not be; that respondent had fully planned and made preparations for production, subcontracting and labor supply;

and that when the award was actually made it immediately took steps towards production, although the evidentiary details of the steps taken do not appear in the record here. It might even be said that respondent would have been foolhardy to enter into binding subcontracting and employment arrangements and to commence production prior to the final award in view of the uncertainties that existed.

Thus, evaluating the allegedly inconsistent evidentiary findings in their proper text and context, it is apparent that they were not set out by the Court of Claims as showing, nor do they show, that respondent could not have performed and at a profit. Indeed the Court of Claims specifically found to the contrary. These findings were obviously recited solely for the purpose of showing the basis upon which the Court of Claims arrived at the profit and damage figure it finally adopted. Respondent's evidence had reflected an anticipated profit of from 8% to 10% of the contract price. In assessing the probative force of this evidence, the Court of Claims was met with and gave certain probative effect to petitioner's evidence indicating some possible difficulties in performance. To the extent that there was inconsistency in the evidence—as indeed there generally is in contested litigation—the Court of Claims resolved the conflict by scaling the respondent's anticipated profit down from the claimed 8% to 10% figure to approximately 4% (see R. 26), resulting in the final award predicated on the finding that respondent "would have made a net profit of at least $80,000". That resolution of the evidence was, as this Court has so often stated, the function of the Court of Claims as the finder of fact. While others might have come to a different ultimate conclusion upon the evidence, this does not furnish the basis for appellate disturbance of the finding in the absence of a showing that it was clearly erroneous. *Walling* v. *General Industries Co.*, 330 U. S. 545, 550; *District of Columbia* v. *Pace*, 320 U. S. 698, 702; *Muschany* v. *United States*, 324 U. S. 49, 57-58 and cases cited.

Petitioner also makes much ado (Br. 27) about the fact that several incidental items of proof were mentioned by the Court of Claims in its opinion rather than in its findings of fact. The opinion does not purport to review all the evidence offered by respondent tending to show it would have earned a profit if permitted to perform. Petitioner refers to items mentioned by the Court in its opinion such as that respondent's production manager who was highly thought of by the Government for his experience and ability was willing to work for the respondent on a percentage of profits basis (R. 25), that respondent's stockholders were willing to finance performance without any advance funds from the Government (R. 25), and that the Government might be expected to show some tolerance to war contractors doing their best to perform (R. 25; 26). These items were mentioned by the court below in its opinion as reflecting upon the probability of a profit had respondent been afforded an opportunity to perform. The Court was pointing out in the opinion that the normal profit (8% to 10% as shown by the evidence) would have been allowed here had not the evidence shown that respondent would probably have encountered problems in a new and "untried field". Yet, in reducing the award to "about 4%" the Court commented upon the aforesaid items as additional reasons fortifying its view that even though the normal profit might not have been expected, a real profit was contemplated.

While petitioner here attempts (Br. 27, *et seq.*) to belittle the probative value of the matters mentioned in the Court's opinion, all of them are fully supported by the evidence adduced below—which, of course, is not part of the record here—and the Court of Claims no doubt would have made them part of its findings of fact if they were necessary to support its judgment. However, they were only mentioned as factual circumstances supplemental to the evidentiary and ultimate findings which have already been summarized. Consequently their omission from the

findings of fact is of no consequence, for they served merely as additional explanation of the reasons for the actual findings made. See *United States* v. *Wells*, 283 U. S. 102, 120-121.[4] There are additional observations in the opinion of the same explanatory nature which also are not subject to objection on the score that they should have been included physically in the special findings of fact. Such additional observations include, *inter alia*, those to the effect that in any case where a long term production contract is breached at the outset there may be uncertainties as to what the future might bring (R. 25), that the difficulties which respondent had to overcome were not unique or unanticipated in the vast conversion from peacetime to wartime production (R. 19), and that the belief of both the Navy and the respondent that respondent could perform the contract was implicit in the Navy's acceptance of respondent's proposal which included an option by the Navy to require respondent to produce additional mounts (R. 17).

Finally, it should be observed that petitioner's entire thesis, that the profits allowed as damages by the Court of Claims are speculative, involves a confusion between approximated future profits, a proper item of damages, and purely speculative profits which cannot be awarded upon breach of contract. Where the claimant fails to adduce

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[4] "It is evident that the court did not consider the statements in its opinion, which we have quoted, as additional findings of fact, but as an argument with respect to the conclusion to be drawn from its findings. In its opinion the court was summarizing what it considered to be the effect of its findings, and no useful purpose would be served in returning the case for a specific finding that the motive which impelled the decedent to make the transfers (121) was precisely that which the court has thus definitely stated. While, in accordance with proper practice and the rule of this court, the Court of Claims should have found the ultimate fact, and we do not approve the method it adopted, we are of the opinion that in view of the findings of fact actually made and the conclusion they import, the judgment should be sustained." 283 U. S. at 121.

any proof whatsoever as to loss of profits caused by breach, an award including them would, of course, be speculative. That was the situation in *United States* v. *Behan*, 110 U. S. 338, for there the Court of Claims specifically stated, and this Court noted, that the claimant had adduced no proof whatsoever as to loss of profits and the Court of Claims did not include any such item in its award. Similarly, where profits were not within the contemplation of the parties in entering into the contract, as, for example, where they are the fruits of independent and collateral engagements or contingent upon future bargains, they would be considered speculative. *Western Union Telegraph Co.* v. *Hall*, 124 U. S. 444. Thus in *Howard* v. *Stillwell & Bierce Mfg. Co.*, 139 U. S. 199, damages for loss of profit from the claimant's anticipated productive use of machinery which the other party had contracted to repair was properly denied because such profit was remote to the contract breached in that it was not within the contemplation of the parties in contracting.

In cases such as the instant one, however, the parties obviously contemplated that profit would be made from production under the contract and, consequently, the loss of profits was directly related to and not a remote consequence of the breach. See *United States* v. *Bethlehem Steel Corp.*, 315 U. S. 289; *Haddad* v. *Western Contracting Co.*, 76 F. Supp. 987, 990 (N. D. W. Va., 1948). In the sense that unless production were actually completed, the precise profit could not be known, anticipated profits might be said to be speculative. This would appear to be the use to which petitioner puts the term "speculative" in this case. However, that usage would in effect bar recovery of anticipated profits in all cases. Use of the term in that sense is, of course, contrary to established principles of law. Actually, the better description of the anticipated or expected profits proved and allowed below is that they were approximated as indeed they had to be since petitioner prevented performance. *Eastman Kodak Co.* v.

Southern Photo Materials, 273 U. S. 359; *Hoffer Oil Corp. v. Carpenter*, 34 F. 2d 589, 592 (C. C. A. 10, 1929). However, damages are not rendered uncertain because they cannot be calculated with absolute exactness; it is sufficient if a reasonable basis of computation is afforded, even though the result is approximate. *Eastman Kodak Co. v. Southern Photo Materials*, *supra*. See also *Gulf States Creosoting Co. v. Loving*, 120 F. 2d 195, 200 (C. C. A. 4, 1941). As was said in *Needles v. United States*, 101 Ct. Cls. 535:

> "Absolute certainty as to the amount of damages is not essential, this being a matter for determination according to the circumstances of each case. There is no objection to damages that they are difficult to ascertain, depending upon contingent and uncertain events, for in all actions for damages for breach of contract the foundation or underlying principle is full compensation for the wrong done. The breach is the standard by which compensation is to be measured, and all that the law requires is that such damages be allowed as, in the judgment of fair minded men, directly and naturally resulted from the breach of contract for which the suit is brought."

Cf. *United States v. Wyckoff Pipe & Creosoting Co., Inc.*, 271 U. S. 263, 267-8, and *United States v. Smith*, 94 U. S. 214, 219.[5] Certainly the Court of Claims removed any

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[5] There the court stated: "A person who has violated his contract will not be permitted to reap advantage from his own wrong, by insisting upon proof which, by reason of his breach, cannot be furnished. . . .

"A party, who has broken his contract, will not be permitted to escape liability because of a lack of a perfect measure of the damages caused by his breach . . .".

[6] In *United States v. Smith* this Court stated:

> "In the estimation of damages, the Court of Claims occupies the position of a jury under like circumstances. Damages must be proven. The Court is not permitted to guess any more than a jury; but, like a jury, it must make its estimates from the proof submitted. The result of the best judgment of the triers is all that the parties have any right to expect."

possible margin of error or speculation by scaling down the asserted margin of profit so as to allow for possible production difficulties.

C. The Court of Claims did not err in failing specifically to find that respondent could not have successfully performed the contract and at a profit.

As a corollary to its attack upon the finding covering loss of profits as having been speculative, petitioner also contends that the evidentiary findings showed and the court should, therefore, have found as an ultimate fact that the respondent could not have successfully performed the contract. However, petitioner erroneously assumes that the Court of Claims was required to make a separate and specific finding as to whether respondent could have performed the contract. On the contrary, having found that a contract existed and that it was breached—which is conceded by petitioner here (see fn. 1, *supra*)—the Court of Claims was obliged only to make an ultimate finding as to damage (see discussion, *supra*, p. 14) which it did in the specific finding as to loss of profits. An ultimate finding that respondent was damaged includes an implicit finding that respondent could have performed.

In any event, for the reasons already set forth in points A and B above, the alleged error in failing to make a negative finding that respondent could not have performed cannot be considered on the present record, and, even if considered, is not borne out by a proper analysis of the findings below or of the function performed by the Court of Claims. That allegation of error is no more than an expression by the petitioner of its disagreement with the factual conclusion reached by the trier of the facts. As shown in point B, the findings as to the difficulties of performance were only one phase of the evidentiary picture, and apparently they did not convince the Court of Claims that respondent could not have performed. The Court of Claims concluded that this evidence, at most, reflected upon

and was reason for reducing the amount of damages claimed by more than one-half. The ultimate finding that respondent "would have made a net profit of not less than $80,000" if it had been permitted to perform, patently assigned to such evidence probative weight only with respect to the exact amount of damages, and necessarily negated and excluded any possible finding that respondent could not have performed. Only by tortured and unimaginative reading of the specific finding as to the profits respondent would have earned had it been permitted to perform would the question whether it could have performed be left unanswered. In such circumstances, a negative finding was not required by reason of the positive finding covering the same subject and the evidence on which it was based. See *Oregon-Washington R. & N. Co. v. United States*, 255 U. S. 339, 349, where this Court stated:

> "The government further urges that the proposed amendment to finding VI, is covered by findings VI (349) and IX, and is only a request 'to change a negative to a positive finding;' that the amendment to finding X is 'rather an argument that certain conclusions should follow from facts found,' and that 'its conclusion, from the facts found, is that both parties regarded the settlements as final, not as tentative.' The amendment to finding XI, is, the government says, 'a request to find evidence,' which is contrary to the rules; and besides, the evidence is immaterial.
>
> "We concur with the government that the request for findings is an effort to change negative to positive findings. The reasoning of the court expresses implicitly, if not explicitly, a view contrary to that expressed in the request. In other words, the court regarded the settlements of appellant with the government as final, and not tentative."

A comparable situation was similarly disposed of by this Court in *United States* v. *Clarke*, 20 Wall. 92, 112. There an appeal from a condemnation judgment, under the so-called Confiscation Act passed after the Civil War, was based, in part, upon the failure of the trial court specifi-

cally to find that the property belonged to any person within the classes specified in the statute as to whose property condemnation could be effected. Answering this contention, the Court said:

> "Having heard and considered evidence, it must be presumed the court found that the property belonged to a person engaged in the rebellion . . . as well as other facts necessary to the rendition of the judgment."

See also *United States* v. *Wells*, 283 U. S. 102, 120; *Canal Bank* v. *Hudson*, 111 U. S. 66, 81. So too, in the instant case, when the Court of Claims found as an ultimate fact that respondent would have made a net profit of at least $80,000 if it had been permitted to perform, it must be presumed that the court necessarily concluded as an underlying evidentiary fact that respondent could have successfully performed the contract and at a profit. To argue, as does petitioner, that this finding required a separate finding that respondent could have performed is specious argument. In substance, all petitioner contends for is that special finding No. 8 should have been broken down into two separate findings instead of one finding covering both elements. That contention is without any merit.

II.

PETITIONER HAD NEITHER CONTRACTUAL NOR STATUTORY RIGHT TO CANCEL THE CONTRACT WITH RESPONDENT, AND SINCE THIS QUESTION IS OUTSIDE OF THE RECORD, IT IS NOT BEFORE THIS COURT.

A. On the Present Record, Petitioner's Contention as to the Right to Cancel is Untimely.

After the Court of Claims had found that respondent would have made a net profit of at least $80,000, and entered judgment accordingly, petitioner, having previously failed to offer a valid reason for cancelling the contract, moved for a new trial (R. 27) on the ground, *inter alia*,

that the Government had a right to cancel the contract without being liable for damages for loss of profits even though the contract did not contain a cancellation clause. Neither the findings nor the opinion of the Court of Claims, which fully covered all of the defenses raised at the trial, dealt with this contention because it had not been raised at the trial and no evidence had been offered to show whether or not any controlling governmental policy existed at the time the contract was awarded or cancelled which would have authorized cancellation of the contract without ordinary liability. The Court of Claims properly denied the motion for new trial (R. 27), to the extent that it raised this new defense, because the assertion therein that the contract was cancellable was untimely and was not directed to any error whether of law or fact, since the issue had not been presented to or disposed of by the court before judgment.

What petitioner sought by its motion for a new trial and now seeks here violates all accepted judicial patterns, for it, in effect, asks a second opportunity—after full and fair resolution of all issues presented—to offer a theory or defense of which it failed to take advantage when opportunity and procedure required. See *Saginaw Broadcasting Co.* v. *Federal Communications Commission*, 96 F. 2d 544, 558 (App. D. C.), certiorari denied 305 U. S. 613. This second opportunity was not permissible under the rules of the Court of Claims and should not be afforded here because review of the Court of Claims' judgment is confined to the record (Rule 41; Revised Rules of the Supreme Court) and that record does not show that petitioner's contention as to the right to cancel reflects error by the court below nor that the motion for a new trial first raising this defense "was one made upon evidence or otherwise in accordance with statute". *United States* v. *Seminole Nation*, 299 U. S. 417, 421.

B. When This Contract Was Awarded and Cancelled, Cancellation Was Not Justified by Any Established Administrative Policy Even If Such Policy Is Considered Material Here.

Even assuming, *arguendo*, that petitioner can now urge it, there is obviously no merit to its contention (Br. 36-41) that the award of loss of profits was improper because a termination clause probably would have been inserted in the formal written contract between the parties in view of established wartime procurement policy.

The Court of Claims found and petitioner concedes (see fn. 1, *supra*) that a binding contract between the parties was effected by the issuance of the notice of award. Nothing contained in that contract expressly or impliedly authorized unilateral termination by the Government.[6] Even if that contract could be modified by an alleged procurement policy of the buyer, the existence, application and effect of such a policy should have been the subject of timely proof. Yet, as we have noted, no proof was offered or adduced below upon which any such factual assertions as petitioner now advances could be founded.

In any event, the claims as to alleged government procurement policy have no force with respect to the instant contract. Even were it demonstrable that when this contract was negotiated and executed in late 1941 and early 1942, the War Department adhered to a policy of inserting termination clauses in all or even most of its procurement contracts, there is literally nothing to indicate that the Navy Department, with whom this particular contract was made, followed the same practice at that time. Although petitioner's citation and alignment of references to various reports, affidavits, etc., attempts to convey a contrary impression, examination discloses that not a single one of the references demonstrates that the *Navy*, in contradistinc-

[6] The terms of the contract are those set out in respondent's "proposal contained in schedule Special—Ord" (a government printed form), as amended, and referred to in the "Official Award" accepting the same. (R. 13-14)

tion to the Army, had such a definitive and well adhered to policy when this contract was awarded. Certainly *ex parte* references to statements of Navy officials made in 1943 and 1944 to the effect that termination clauses "developed late in 1941" were inserted in "most contracts" is of no probative value to support the proposition that such a clause would have been inserted in this particular contract negotiated at the end of 1941, assuming that such *ex parte* insertion could have been done. La Brum discussing the status of the War Department's termination policy as of December, 1943—which was then far more advanced than that of the Navy—states that "While termination articles presently appear in most Government contracts, there is no uniform termination article", La Brum, *Termination of War Contracts For The Government's Convenience* (Dec., 1943), 18 Temple L. Q. 1, 18. Obviously, therefore, even some contracts let by the War Department up to late 1943 contained no termination clause.

Actually, the first official Navy requirement that termination clauses should be inserted in procurement contracts was not issued until more than two years after the instant contract was executed. That requirement (Navy Contract Termination Directive No. 1 of February 28, 1944) [7] was issued after the establishment of the Joint Contract Termination Board on November 12, 1943 and the promulgation of the Joint Termination Regulation, effective Janu-

[7] The directive (contained in *Navy Procurement Directives*) states in its first paragraph:

> "The Office of War Mobilization has prescribed a Uniform Termination Article for Fixed-Price Supply Contracts for use by Government procurement agencies and a Statement of Principles for Determination of Costs upon Termination of Government Fixed-Price Supply Contracts. The Secretary of the Navy hereby directs the insertion in all Navy fixed price contracts dated more than thirty days after the date hereof for the manufacture or sale to the Government in the continental United States of war supplies and equipment other than the contracts specified in paragraph 4 hereof, of the provisions set forth in Enclosure (A), which incorporates by reference Enclosure (B)".

ary 8, 1944," both of which "were the result of executive and legislative studies showing the need for uniformity in war contract termination policies and procedures." Accordingly, it is clear that petitioner and respondent did not agree to or contemplate that the Government would have the right unilaterally to cancel the instant contract. It is equally clear that there was no such articulation of *Navy* practice when this contract was executed as would justify any speculative inference upon which to read such a provision into the contract.[10]

C. When This Contract Was Awarded and Cancelled, There Was No Statutory Authority for Unilateral Termination.

Petitioner argues (Br. 41-57) that the Navy "may well have [been] furnished" (see Pet. 21) with the power to terminate this contract by virtue of a provision of the First War Powers Act,[11] empowering the President to authorize any war agency to "enter into contracts and into

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[8] The Uniform Termination Article for fixed price war supply contracts was made effective on the above date by the Director of War Mobilization's directive order No. 1, 9 Fed. Reg. 478 (Directive and subsequent explanatory directives and statements of policy set out in C. C. H., *Government Contracts Reporter*, paragraph 41, 203, *et seq.*

[9] See U. S. Office of War Mobilization Report on *War and Post-War Adjustment* (1944), 90 Cong. Rec. No. 2, January 11, 1944. See also Hearings before Subcommittee of Senate Committee on Military Affairs on *Problems of Contract Termination* (considering S. 1268, S. 1280 and S. J. Res. 80, 78th Cong. 1st and 2nd Sess., 1943-44) which preceded enactment of the Contract Settlement Act of 1944.

[10] Even petitioner can only state that it is "probable" that a termination clause would have been inserted in the formal contract (Br. 36, 41). Unless this is *certain* and respondent was chargeable with knowledge of this certainty, it is difficult to understand the logic by which such a provision could retroactively be read into the contract.

[11] Act of December 18, 1941, c. 593, Title II, Sec. 201, 55 Stat. 839, 50 U. S. C. App., Supp. V, 611.

amendments or modification of contracts whenever he deems such action would facilitate the prosecution of the war . . ."

This contention is an abuse of reason and the plain language of the statute, and is rebutted by consistent administrative interpretation to the contrary. Its vice is that it distorts a legislative grant of authority to amend contracts by negotiation and mutual agreement into a pretended authority for unilateral cancellation.

Notwithstanding petitioner's burdened attempt to find solace in generalizations from the legislative history of the First War Powers Act (see Br. 46-48), there is nothing in that history showing that the Government was intended to have *unilateral* authority to alter, amend or cancel contracts. The broad language of the legislators had reference only to the fact that the ordinary law, statutory or otherwise, was being laid aside to facilitate mutual and speedy negotiation or amendment of contracts.

A review of administrative interpretation and practice under the First War Powers Act confirms this. The pertinent portions of the First War Powers Act were, of course, not self-operative. The Act gave certain powers to the President, but those powers could not be exercised by the contracting agencies administering the provisions without appropriate delegation of authority by the President. By Executive Order 9001[12] such delegation was effected by the President. The pertinent provision of that order (paragraph 3)—which petitioner chooses to overlook (see Br. 42-43)—provided:

> "The War Department, the Navy Department, and the United States Maritime Commission may *by agreement* modify or amend or settle claims under contracts." [Italics supplied.]

Thus, even assuming, *arguendo*, that the First War Powers Act empowered the President to effect unilateral cancella-

[12] December 27, 1941, 6 Fed. Reg. 6787, 3 C. F. R. (1941 Supp.) pp. 330-332.

tions of war contracts, by Executive Order 9001 the President chose not to exercise this authority and instead circumscribed the authority of the contracting agencies to modify, amend or settle contracts by requiring mutual agreement of the contractors and the agencies. That the power delegated was thus limited is apparent from the administrative practice following the issuance of the executive order. Shortly thereafter the Secretary of War submitted to the Attorney General for opinion a proposed subdelegating order which provided:

> "The powers hereby delegated may be exercised by (a) *supplemental agreements* which may modify or amend or settle claims by or against the United States arising under or with respect to any contracts heretofore or hereafter made; (b, *agreements with contractors or obligors* releasing accrued obligations of any sort * * * or (c) *supplemental agreements* and change orders suspending or modifying the operation of existing contracts * * *."[13] [Italics supplied.]

In his opinion as to the validity of the proposed order, the Attorney General confirmed the statutory requirement of bilateral action, stating (40 Ops. Atty. Gen. No. 53, August 29, 1942, at p. 9):

> "In passing the First War Powers Act, *the Congress* desired to enable you (Secty. of War), *and the contractors* who supply you with war material to revise and modify existing arrangements so as to meet the countless dislocations and uncertainties caused by (conditions and exigencies of war, etc.") [Italics supplied.]

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[13] The Secretary's order is quoted in the text of 40 Ops. Atty. Gen., No. 53, August 29, 1942. That opinion, the proposed order and examples of action to be taken thereunder are all set out in full at pp. 360-368 of the Senate Hearings on *Problems of Contract Termination*, *supra* fn. 9.

The same conclusion is evident from an opinion of the Judge Advocate General which states:

> "Under the First War Powers Act, 1941 (55 Stat. 838, 50 U. S. C. 611) and Executive Order No. 9001, issued pursuant thereto
>
> > "*The Secretary of the War* may, where it has been administratively determined that it will facilitate the prosecution of the war, *terminate contracts* for the convenience of the government *by entering into supplemental agreements* providing for negotiated lump-sum settlement * * * whether or not such contracts contain clauses authorizing termination by the Government and providing a method of settlement in the event the contract is so terminated."[11] [Italics supplied.]

The Judge Advocate's opinion also quoted a decision of the Comptroller General to the effect that termination settlement would be honored only where the original contracts were so amended "by agreement". That the Navy Department also so construed the authority conferred by the First War Powers Act is apparent from the terms of its directives relating thereto dated September 16, 1942, July 7, 1943 and December 15, 1944, Part IV, Amendments And Modifications of Contracts, *Navy Procurement* Directives, pp. 5711-5715. This was also the view of the

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[11] 1 Bull. J. A. G. No. 5, pp. 304-305, October 1942. The Army Ordnance Department implemented the opinions quoted in the text by advice to its contracting officers on October 9, 1942 that the "Secretary of War has made the administrative determination that negotiated settlements, upon termination for the convenience of the Government when *agreed to by the contractor* will facilitate the prosecution of the war effort and the amendment of existing contracts to provide for such settlements has been authorized under the provisions of the First War Powers Act and Executive Order No. 9011. Existing contracts may therefore *with the contractor's consent* be amended so as to include provisions set forth in paragraph 1". Goldman, *Termination of War Contracts*, 42 Mich. L. Rev. 733, 745. [Italics supplied.]

Office of Contract Settlement established under the Contract Settlement Act of 1944.[15]

The petitioner cannot, of course, gain comfort from the administrative and judicial application of World War I statutes, because vital and controlling differences in terminology make those statutes inapposite. The World War I statutes referred to by petitioner specifically authorized the President to "modify, *suspend, cancel* . . ." [Emphasis supplied to Act of June 15, 1917, 40 Stat. 182] whereas the First War Powers Act of World War II merely gave the power to amend, not to cancel. Moreover, those World War I statutes are no longer operative.[16]

That petitioner's present argument as to its statutory right of unilateral cancellation is made of whole cloth is apparent from the Attorney General's contrary disposition of the problem in 1943. During the course of the Senate hearings on the problem of contract termination, Senator James E. Murray, Chairman of the Subcommittee, wrote

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[15] A pamphlet report of that Office of July, 1947, entitled *A History of War Contract Terminations and Settlements* states (Ch. IV, p. 7):

> ". . . the War Department amended its termination article to include an alternative provision for negotiating a settlement. The theory of this was that the contractor's termination claim could be compromised and adjusted by agreement between the parties as businessmen would do in private transactions. . . . The legal basis for this concept was the First War Powers Act of December 18, 1941 . . . On August 29, 1942, the Attorney General issued an opinion (40 Ops. Atty. Gen. No. 53, 1942) that this statute authorized the settlement of termination claims by negotiation."

[16] The Act of June 15, 1917 was merely an annual Urgent Deficiency Appropriation Act. The other World War I statute referred to by petitioner, the Dent Act (Act of March 2, 1919, 40 Stat. 1272) was self-liquidating as to World War I contracts, for by its terms it applied only to agreements entered into prior to November 12, 1918 provided also that the contractor presented his claim prior to June 30, 1919.

to the Attorney General, under date of November 20, 1943, as follows:

> "Seventh, many divergent views have been presented to members of the Committee concerning the common-law rights of a contractor whose contract has been terminated, as distinguished from his rights under a termination clause. Would it be possible for you to analyze these common-law rights in detail for the benefit of the committee, comparing them point by point with the rights of a contractor under the standard clause now used by the War Department."[17]

In response, the Attorney General submitted a memorandum stating:

> "7. Common-Law Rights of a Contractor Whose Contract Has Been Terminated, Compared With a Contractor's Rights Under a Termination Clause.
>
> "In general it may be said that the difference between the common-law rights of a contractor whose contract has been terminated and the rights given by the standard termination clause now in use by the War Department is the difference between the right to recover damages for a breach of contract and the right to have the contract performed in accordance with its terms. * * *
>
> "In the event of the termination of a contract that does not contain a termination clause, where the contractor does not agree to terminate and there is no exercise of the Government's power of eminent domain, and where the contractor is satisfactorily performing his part of the agreement at the time of termination, the Government's refusal to accept complete performance and to pay the agreed consideration in full would, in normal circumstances, constitute a breach of the contract for which the contractor would be entitled to recover damages. In such case, generally speaking, a court would attempt to give the contractor a judgment which would place him in the same financial position as if the contract had been fully performed. However, there are a number of conditions which the contractor would have to meet in order to

[17] Senate Hearings, *supra*, fn. 9, Part 5, pp. 521-522.

> be assured of complete relief. For example, he would have to demonstrate that he had taken reasonable steps to mitigate his damages; that particular items of loss were reasonably within the contemplation of the parties as probable consequences of a breach, and that they were occasioned by the breach; that anticipated profits claimed to have been lost would have been earned but for the breach, and that they were not too speculative and remote; . . ."[18]

Thus at a point of time determinative of the rights and liabilities in this cause, the Attorney General unequivocally stated to the Congress, as a basis for legislative action, that absent a termination clause, the Government was liable for breach of contract upon its unilateral cancellation and that in such event anticipatory profits could be recovered. The same view was expressed and acted upon by the contracting agencies. Thus the War Department's text, *Government Contracts and Readjustment* (published for use by J. A. G. officers) states that ordinary liability for breach follows from cancellation of a contract without a termina-

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[18] *Senate Hearings, supra, fn. 9, at p. 529.* Earlier during the same Senate hearings, Attorney General Biddle confirmed the necessity of bilateral action to avoid the consequences of breach by stating (p. 343):

> "Even in the absence (from the contracts) of the termination provisions which I have mentioned, I think it clear that the contracting agencies have the power to negotiate with their contractors for the termination of contracts * * *"

Petitioner attempts (Br. 51-52, fn. 24) to alleviate the telling effects of the Attorney General's 1943 memorandum by characterizing it as having been confined solely to a discussion of common law rights. However, the Committee and the Attorney General were concerned with the respective rights and liabilities of the Government and the contractor in the absence of a contractual termination clause. Both the Committee and the Attorney General obviously assumed—and correctly—that in the absence of such a clause, both parties were governed by the common law of contracts and damages and that no statute (including the then extant First War Powers Act) altered the applicable common law.

tion clause except insofar as an implied termination clause might be read into contracts entered into *after* enactment of the Contract Settlement Act of 1944.[19] That text reads as follows (at pp. 159-160, 178-179 (fn. 50)):

> "To permit such termination without liability for breach of contract, the War Department, since 16 September 1941, has included in its contracts a termination article giving the Government the right to terminate the contract for its convenience or its option."
>
> "The Government is liable for breach of contract where it prevents performance by the other party to a contract. See Ch. VIII, 'Performance and Breach by the Government'. Ordinarily cessation of the war or lack of use for the war material contracted for does not relieve the Government of liability under a duly authorized contract. It has, however, been held that the existence of a statute authorizing the President to terminate a war contract and pay reasonable compensation to the contractor will bar recovery of anticipated profits, on the theory that the statute was an implied condition of the contract. *Buffalo Union Furnace Co. v. United States Shipping Board Emergency Fleet Corp.*, 291 Fed. 23 (C. C. A. 2d, 1923). See also *Russell Motor Car Co. v. United States*, 261 U. S. 514 (1923). This principle might be applied to war contracts not containing termination articles in view of the provisions of the Contract Settlement Act."
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> * * * * * * *
>
> "Under principles applied by the courts in the construction of war statutes similar to the Contract Settlement Act, it would appear that war contracts entered into after adoption of the Act [i.e. after July 1, 1944] contain an implied condition that such contracts may be terminated upon payment of fair compensation as defined in the Act. See Ch. XIV, 'The Contract Settlement Act.' This principle would seem to eliminate recovery of anticipated profits on work not done even where such a contract does not contain a termination article."

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[19] Act of July 1, 1944, 58 Stat. 649, 41 U. S. C., Supp. V, 101 *et seq.*

The same conclusion is reached by writers conversant with the termination problem. Malman, *Policies and Procedures for the Termination of War Contracts*, 10 Law and Contemporary Problems 449, 466-467, discussing Army Procurement Regulation 15, published August 14, 1943, states:

> "Contracts containing no termination article may be terminated and finally settled by supplemental agreement where such termination is to the interest of the Government. Even here, however, and apparently to avoid the consequences of a breach of contract, the contract is to be amended whenever possible to contain the standard form of termination article, or to provide some other mutually acceptable basis of settlement, either before or after the contractor has been ordered to stop work. Where no satisfactory agreement can be reached with the contractor, he may nevertheless be ordered to discontinue further performance. This the War Department recognizes as a breach of contract; PR 15-311 (4) states that the 'contractor may thereafter present his claim if any, for damages arising out of this order, to the General Accounting Office or other courts for settlement.' However, PR 15-311 (d) discourages the use of such orders to stop performance stating that it 'is not consistent' with War Department policy for the Government to commit breaches of contract * * *"

See also LaBruna, *Termination of War Contracts for the Government's Convenience* (Dec., 1943), 18 Temple L. Q. 1, 9.

Finally, it should be observed that petitioner has not been able to quote or cite any authority—indeed all are to the contrary—specifically stating that under the First War Powers Act the Government had the right unilaterally to cancel a war contract without ordinary liability for breach of contract.

SUMMARY.

From what has been said it is clear that the instant contract neither expressly, nor impliedly by reason of any established administrative policy or pertinent statute, authorized unilateral termination by the Government. It is equally clear from accepted administrative interpretation and from established principles of government contract law that, during the period here in question, in the absence of a termination clause ordinary liability for breach of contract—including the assessment of damages for loss of anticipated profits—results from a unilateral termination.[26]

It has also been shown that, exercising its proper function *qua* jury, the Court of Claims exaluated conflicting evidence as to probable loss of profits and damages and made an ultimate finding of fact in that regard which on the record reflects a proper effort to ascertain the fair minimum measure of respondent's loss and which, in the absence of a showing that such finding is not supported by substantial evidence, must be taken as conclusive here.

Accordingly, petitioner's present argument resolves itself into an attempt to inject an entirely new but vague concept into government contract law. Although it has long been recognized that, unless varied by the contract itself or by proper legislative action by the sovereign, the Government is liable for breach of contract and for the same measure of damages as are private persons, petitioner now asks the Court, in effect, to establish separate standards for governmental contractual liability. The touchstone of liability and damage would not be the contract, the established law of contracts and damages, nor legislative fiat. It would be an illusory inquiry into such factors as the vagaries of inarticulated administrative practice, the peculiar exigencies of the contracting agency involved and an un-

[26] ". . . in the absence of a statute or a termination clause, recovery upon the theory of breach is proper." Williston on *Contracts*, (Rev. ed., 1945), Vol. 9, *War Contract Claims*, Sec. 116.

determined and vague standard by which no one could measure his rights under any contract with the Government.

Such notions would, respondent submits, be destructive of law and run contrary to our basic concept that even the Government is governed by law. It would destroy the standard upon which the Government contracts with industry. Indeed, if the present applicable standards of contractual liability are not deemed sensible for the treatment of government contracts, appropriate steps can be taken by the Government to utilize different contractual provisions or seek pertinent legislation. See *United States v. Bethlehem Steel Corp.*, 315 U. S. 289, 309. Under the instant contract and existing legislation, established legal principles must be applied and they support the judgment below.

CONCLUSION.

For the reasons stated above, it is respectfully submitted that the judgment of the Court of Claims is correct and that it should be affirmed.

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